

April 12, 2018

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Ex Parte Presentation
WC Docket Nos. 10-90 & 07-135; CC Docket No. 01-92

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter provides notice that on April 10, 2018, John Barnicle, President and Chief Executive Officer of Peerless Network, Inc. ("Peerless"), along with the undersigned and Susan Goldhar Ornstein, counsel for Peerless met with Wireline Competition Bureau staff that included Lisa Hone, Pamela Arluk, Victoria Goldberg, Gil Strobel, John Hunter, Irina Asoskov, Gregory Capobianco, Edward Krachmer, Albert Lewis, Rhonda Lien, Joseph Price, Arielle Roth, Douglas Slotten, and Shane Taylor. David Sieradski from the Wireless Telecommunications Bureau and Lisa Griffin from the Enforcement Bureau also joined this meeting.

During the meeting, Peerless discussed the issues raised in its March 15, 2018 letter¹ and previous filings concerning T-Mobile's unlawful refusal to offer direct connects for wholesale traffic.² Peerless also provided a brief overview of direct connect issues Peerless has observed with other national wireless providers.

¹ See Letter from John Barnicle, President and Chief Executive Officer, Peerless Network, Inc. and Philip Macres, Counsel for Peerless, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 07-135; CC Docket No. 01-92 (dated Mar. 15, 2018) ("Peerless's Mar. 15, 2018 Letter"), available at <https://ecfsapi.fcc.gov/file/1031530934781/2018-03-15%20Ex%20Parte%20of%20Peerless%20Network%2C%20Inc..pdf>.

² See Comments of Peerless Network, Inc.; West Telecom Services, LLC; Peninsula Fiber Network, LLC; Alpha Connect, LLC; Rural Telephone Service Company, Inc. d/b/a Nex-Tech; Nex-Tech, LLC; and Tennessee Independent Telecommunications Group, LLC d/b/a iRis

Peerless emphasized that the Commission should immediately adopt the proposed Direct Connect Requirement.³ Peerless explained that the Commission has the authority and record support to adopt such a rule pursuant to Sections 201(a), 201(b), 202(b), the spirit Section 251(a) of the Communications Act of 1934, as amended (the “Act”),⁴ as well as various Commission orders.⁵

In addition, Peerless urged the Commission to adopt rules that prohibit carriers from entering into and enforcing nondisclosure agreements with “overly broad, restrictive, or coercive nondisclosure requirements”⁶ intended to forbid or restrict voluntary communications with—and the voluntary disclosure of information to—the Commission (“Anti-Competitive NDAs”) as a prerequisite to negotiating direct connects to terminate traffic to a carrier’s end users. Peerless explained that the Commission must prohibit carriers from entering into and enforcing such Anti-Competitive NDAs when negotiating direct connects to terminate traffic to the end users of carriers with “bottleneck monopolies” of the “essential components” needed to access each of

Networks, WC Docket No. 10-90; CC Docket No. 01-92, at 11-23 (filed Oct. 26, 2017) (“Carrier Coalition Comments”), available at <https://ecfsapi.fcc.gov/file/1026216424632/2017-10-26%20Comments%20of%20Peerless%2C%20West%2C%20Peninsula%20Fiber%20Network%2C%20Alpha%20Connect%2C%20Nex-Tech%2C%20and%20iRis%20Networks.pdf>; Reply Comments of Peerless Network, Inc.; West Telecom Services, LLC; Peninsula Fiber Network, LLC; Alpha Connect, LLC; Rural Telephone Service Company, Inc. d/b/a Nex-Tech; Nex-Tech, LLC; and Tennessee Independent Telecommunications Group, LLC d/b/a iRis Networks, WC Docket No. 10-90; CC Docket No. 01-92, 11-14 (filed Nov. 20, 2017) (“Carrier Coalition Reply Comments”), available at <https://ecfsapi.fcc.gov/file/1120580029282/2017-11-20%20Reply%20Comments%20of%20Peerless%2C%20West%2C%20Peninsula%20Fiber%20Network%2C%20Alpha%20Connect%2C%20Nex-Tech%2C%20and%20iRis%20Networks.pdf>; Letter from Philip Macres, Counsel for Peerless *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 07-135, CC Docket No. 01-92 (filed Dec. 4, 2017) (“Dec. 4, 2017 *Ex Parte* Notice”), available at <https://ecfsapi.fcc.gov/file/1204455516966/2017-12-04%20Ex%20Parte%20Notice%20of%20Consolidated%2C%20Peerless%2C%20and%20West%2C%20WC%20Docket%20Nos.%2010-90%20%26%2007-135%2C%20CC%20Docket%20No.%2001-92.pdf>.

³ Peerless’s Mar. 15, 2018 Letter, at 1-2, n.4 & 11; Dec. 4, 2017 *Ex Parte* Notice at 2; Carrier Coalition Comments at 11.

⁴ 47 U.S.C. §§ 201(a), 201(b), 202(b), & 251(a).

⁵ See, e.g. Carrier Coalition Comments at 16-23; see also Peerless’s Mar. 15, 2018 Letter at presentation p.2.

⁶ *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Report and Order, ¶ 188, 32 FCC Rcd 3459 (rel. Apr. 28, 2017) (“*BDS Order*”) (citation and subsequent history omitted).

their individual end users.⁷ Peerless noted that in the *BDS Order*, the Commission recognized that NDAs altogether forbidding or restricting a party's ability to voluntarily disclose information (including forbidding or restricting such information from being filed subject to confidential treatment) to the Commission were unlawful where a market is non-competitive.⁸ Since national wireless carriers control all direct access to their respective end users, the market to access their end users is inherently non-competitive. Accordingly, Peerless explained that requiring carriers to sign Anti-Competitive NDAs in these circumstances is an unjust and unreasonable practice that violates Section 201(b) of the Act.⁹

Peerless also urged the Commission to prohibit carriers from entering into or enforcing exclusivity in direct connect arrangements for the termination of traffic to a wireless carrier's end users. Peerless explained that the Commission has clear authority to adopt such a rule, as it has previously exercised that authority when it prohibited carriers from entering into or enforcing exclusivity contracts with premises owners in predominantly residential multiple tenant environments ("MTEs").¹⁰ In adopting that prohibition, the Commission explained that "such exclusivity contracts are unjust and unreasonable practices pursuant to Section 201 of the Act because they perpetuate the barriers to facilities-based competition that the 1996 Act was designed to eliminate."¹¹ Since Commission had the authority to adopt such a prohibition in the context of carriers with exclusivity contracts with predominantly residential MTE, then, *a fortiori*, the Commission has the authority to prohibit carriers from entering into or enforcing exclusivity in direct connect arrangements for the termination of traffic to a wireless carrier's end users.

⁷ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 30 (2001).

⁸ *BDS Order*, ¶¶ 187-196; *see also* 47 C.F.R. § 69.805(a) ("In markets deemed non-competitive, buyers and sellers of business data services shall not enter into a tariff, contract-based tariff, or commercial agreement, including but not limited to master service agreement, that contains a non-disclosure agreement as defined in § 69.801(g), that restricts or prohibits disclosure of information to the Commission, or requires a prior request or legal compulsion by the Commission to effect such disclosure.").

⁹ 47 U.S.C. § 201(b).

¹⁰ *See* 47 C.F.R. § 64.2500 ("(a) No common carrier shall enter into any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises. (b) No common carrier shall enter into or enforce any contract, written or oral, that would in any way restrict the right of any residential multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve residential tenants on that premises."); *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Report and Order, 23 FCC Rcd 5385, ¶ 2 (2008) ("*2008 Competitive Networks Order*").

¹¹ *2008 Competitive Networks Order*, ¶ 2.

If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,



Philip J. Macres

Counsel for Peerless Network, Inc.

cc: Lisa Hone (all via email)
Pamela Arluk
Victoria Goldberg
Gil Strobel
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